No. 91-1521

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

LOWELL GREEN

ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent asserts (Resp. Br. 26) that nothing in the facts of this case distinguishes it from this Court's decisions in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), *Arizona* v. *Roberson*, 486 U.S. 675 (1988), and *Minnick* v. *Mississippi*, 111 S. Ct. 486 (1990). Contrary to respondent's assertion, the facts of this case are critically different from the facts of each of the cases on which respondent relies. Respondent invoked his right not to be questioned in the absence of counsel following his arrest on a drug

charge; he subsequently obtained counsel and entered a plea of guilty to that charge; several months later, he was questioned about the murder at issue in this case; before questioning him about the murder, the police advised him of his *Miranda* rights; he waived those rights and voluntarily agreed to speak with the police.

Three important points emerge from these facts. First, the drug charge that provoked respondent's invocation of his right not to be questioned in the absence of counsel had been resolved by a plea of guilty long before the police approached respondent with respect to the murder allegation. Second, more than five months elapsed between respondent's invocation of his right to counsel and the reinitiation of interrogation by the police. Third, the murder allegation was wholly unrelated to the drug charge as to which respondent had declined to be questioned in the absence of counsel, and in fact respondent had been provided with counsel in connection with the drug charge. Under these circumstances, there is no justification for holding that the Constitution requires the courts to presume, irrebuttably, that respondent's agreement to speak with the police about his involvement in the murder was the product of official coercion.

a. Respondent contends (Resp. Br. 20-23) that in spite of his decision to plead guilty to the drug charge, there should still be an irrebuttable presumption, as there was in *Edwards*, that his agreement to speak with the police was the product of coercion. The *Edwards* presumption should continue to apply after his guilty plea, respondent argues, because "entry of the guilty plea with his attorney present is consistent with his original desire to deal with the

government through his attorney." Resp. Br. 22-23. The amici supporting respondent likewise contend (Public Defender Br. 16-28) that respondent's guilty plea is irrelevant to the *Edwards* presumption, because the guilty plea was neither a waiver of the right to counsel during custodial interrogation nor a reinitiation of discussions with the police.

Respondent and his amici misconstrue our argument. As we explain in our opening brief (at 16), we agree with respondent and his amici that "a guilty plea is not necessarily inconsistent with a continuing desire to deal with the government only through counsel." But we disagree with respondent's suggestion that *Edwards*' irrebuttable presumption can be lifted only by an event that conclusively establishes that the suspect has decided to speak with the police in counsel's absence. That suggestion is disproved by the "break in custody" cases. A break in custody, like a guilty plea, does not conclusively establish that a suspect wishes to speak to the police directly. The courts nevertheless have held that a break in custody marks a significant change in the suspect's circumstances, and that it is no longer reasonable to presume, irrebuttably, that any decision to submit to police questioning is the product of coercion. See Pet. Br. 16 (collecting cases).

The same reasoning applies here. As respondent acknowledges, a guilty plea is "a break in the chain of events which has preceded it in the criminal process," Resp. Br. 20 (quoting *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973)), and "constitutes a waiver of the Fifth Amendment right not to be compelled to incriminate oneself." Resp. Br. 20 (citing *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969)). Given the dramatic change in a suspect's circum-

stances after he pleads guilty to the charge on which he requested counsel, it is unreasonable to presume, irrebuttably, that any subsequent decision to respond to questioning on a different subject is the product of police coercion.[1]

b. Unlike the suspects in this Court's previous *Edwards* cases, respondent was not subjected to repeated police interrogation within a period of a few days. Instead, the police made no effort to interrogate respondent for more than five months after he declined to be questioned in the absence of counsel. Respondent acknowledges that the purpose of the *Edwards* rule is to "prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." Resp. Br. 19 (quoting *McNeil* v. *Wisconsin*, 111 S. Ct. 2204, 2208 (1991), quoting, in turn, *Michigan* v. *Harvey*, 494 U.S. 344, 350 (1990)). Respondent also concedes (Resp. Br. 23) that the "danger [of badgering] is reduced when the police have made no effort to interrogate the defendant for more than five months after his assertion of rights." Because a suspect who is approached for questioning only twice in five months is unlikely to feel badgered, there is no justification for applying a "perpetual" *Edwards* presumption to suspects in respondent's circumstances.

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[1] Although we submit that the *Edwards* presumption ceases to apply in that setting, the suspect's right not to incriminate himself remains protected by the requirements of *Miranda*. If the police seek to question the suspect, they must repeat the *Miranda* warnings, and any waiver of the suspect's Fifth Amendment rights must be voluntary, knowing, and intelligent. See *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). Those protections were afforded to respondent in this case.

Respondent contends (Resp. Br. 24) that "[a]s custody is prolonged the respondent becomes institutionalized by the incarceration" and "feel[s] compelled to continue to abide by the instructions of those in authority." Respondent offers no support for that sweeping assertion. If respondent's assertion were correct, it would suggest that all statements obtained from suspects who have been in custody for a significant period of time are involuntary and therefore inadmissible. No court has adopted such a rule. Indeed, the lower courts have drawn the opposite conclusion about extended periods of custody: they have recognized that restraints on an inmate's liberty are a constant feature of prison life and become familiar to the inmate. Consequently, those restraints are unlikely to have the coercive effect that the *Miranda* rules are intended to dispel. See *United States* v. *Cooper*, 800 F.2d 412, 414-415 (4th Cir. 1986); *United States* v. *Scalf*, 725 F.2d 1272, 1275-1276 (10th Cir. 1984); *Cervantes* v. *Walker*, 589 F.2d 424, 428 (9th Cir. 1978).[2]

Respondent's principal objection to placing a time limit on the *Edwards* presumption is that it would

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[2] Respondent also contends (Resp. Br. 24) that he was particularly vulnerable to the authorities because he was awaiting sentencing on a drug charge. But that claim is not relevant to the question whether respondent felt badgered when the police approached him about the murder. It is relevant, of course, to the question whether respondent's subsequent waiver of his *Miranda* rights and confession were voluntary. As to that question, however, the trial court correctly concluded that respondent's waiver and confession were voluntary, and respondent has not challenged that conclusion either in the court of appeals or in this Court.

"dim or eliminate the 'bright-line rule' established in *Miranda*, *Edwards*, *Roberson*, and *Minnick*." Resp. Br. 10. See also *id.* at 24-25. In fact, however, a rule that the *Edwards* presumption lasts as long as the suspect remains in custody has only the appearance of clarity. What is important is not whether a rule can be easily stated, but whether the rule gives workable guidance to police officers. The perpetual and all-encompassing rule that respondent advocates is not workable.

Suspects often commit multiple crimes, and it is not unusual for persons in custody for one offense to become suspects in other cases. Suspects or prisoners are often transferred from one jail or prison to another, and they may be questioned at different times by officers from various federal, state, and local law enforcement agencies. It would often be difficult for law enforcement officers to determine whether a suspect in long-term custody has requested counsel at any time, in any place, during interrogation by any official. The "bright-line rule" suggested by respondent thus would not provide clear guidance to law enforcement officials charged with applying it and therefore lacks the chief virtue of a bright-line rule.

Even in its current applications, *Edwards* does not provide a simple and determinate set of rules, as respondent suggests. In applying *Edwards*, the police—and courts reviewing the actions of the police—are regularly confronted with difficult questions, such as (1) whether the suspect is "in custody" for *Miranda* purposes, see *Berkemer* v. *McCarty*, 468 U.S. 420 (1984); *Oregon* v. *Mathiason*, 429 U.S. 492 (1977); *Beckwith* v. *United States*, 425 U.S. 341 (1976); (2) whether the activity at issue amounts to "interrogation" within the scope of the *Miranda* rules, see *Pennsylvania* v. *Muniz*, 496 U.S. 582 (1990); *Arizona* v. *Mauro*, 481 U.S. 520 (1987); *Rhode Island* v. *Innis*, 446 U.S. 291 (1980); (3) whether the suspect has "invoked" the right to counsel, see *McNeil* v. *Wisconsin*, 111 S. Ct. 2204; *Connecticut* v. *Barrett*, 479 U.S. 523 (1987); *Smith* v. *Illinois*, 469 U.S. 91 (1984); and (4) whether a suspect who initially requested counsel has surrendered that right by "initiating" further conversation with the police, see *Oregon* v. *Bradshaw*, 462 U.S. 1039 (1983). Thus, respondent's argument in favor of maintaining a bright-line rule at any cost is based on the false premise that *Edwards* provides clear guidance in those cases that it governs.

Even if it were true that placing a time limit on the *Edwards* presumption would decrease the clarity of the rules governing custodial interrogations, the Court has emphasized that prophylactic rules should be "'clear and unequivocal' * * * only when they guide sensibly," and it has not hesitated to limit the prophylactic rules of *Miranda* and *Edwards* where "clear and unequivocal rules" would "do much more harm than good." *McNeil*, 111 S. Ct. at 2211. See *New York* v. *Quarles*, 467 U.S. 649, 658 (1984) (adopting exigent circumstances exception to *Miranda* even though the exception "to some degree * * * lessen[s] the desirable clarity of that rule."). A rule that turns the *Edwards* presumption into "a laser, burning inexorably through form and substance into infinity" would not be sensible, and would do much more harm than good. *Kochutin* v. *State*, 813 P.2d 298, 310 (Alaska 1991) (Bryner, C.J., dissenting). Consequently, placing some limits on the *Edwards*

rule is justified even if it would entail some loss of the "bright-line" quality of that rule.

c. Respondent concedes (Resp. Br. 25) that this case differs from *Arizona* v. *Roberson* because the police honored respondent's request for counsel before reinitiating interrogation; he concedes that it differs from *Minnick* v. *Mississippi* because the interrogation concerned a completely unrelated offense. Nonetheless, respondent argues that this case is controlled by *Minnick* and *Roberson*, because in each of those cases the Court rejected one of the distinctions between this case and *Edwards*. But the separate rejection of each distinction does not require suppression of a confession in a case in which both distinctions are present. The fact that counsel was made available to respondent eliminated the coercive pressures that arise when the police seek to reinitiate interrogation of a "suspect who has been denied the counsel he has clearly requested." *Roberson*, 486 U.S. at 686 & n.6. And the fact that the questioning concerned an unrelated offense minimized the risk that respondent would be badgered into making a statement by repeated police-initiated questioning. See *Minnick*, 111 S. Ct. at 491. Thus, because the concerns that prompted the Court's decisions in *Roberson* and *Minnick* are not present here, those cases do not justify application of the *Edwards* presumption in the circumstances of this case.

2. Respondent's amici contend (Public Defender Br. 34-41) that the *Edwards* rule should be applied in this case because the government had committed itself to prosecute respondent at the time the police initiated the interrogation. That argument, which is based on Sixth Amendment principles, is inapposite here.

In the first place, the Sixth Amendment right to counsel is not at issue in this case. The court of appeals held (Pet. App. 3a-4a n.1) that this case presents "no issue of violation of [respondent's] right to counsel under the Sixth Amendment." As amici concede (Public Defender Br. 36 n.10), respondent "has not sought review of that holding." Moreover, our petition presented the single question "[w]hether *Edwards* * * * requires the suppression of [respondent's] confession * * *." Pet. i. Amici are not entitled to present additional questions. *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981); *Bell* v. *Wolfish*, 441 U.S. 520, 531-532 n.13 (1979).[3]

In any event, respondent's Sixth Amendment right to counsel on the murder charge had not attached at the time of the interrogation. Respondent had not been indicted, arraigned, or presented on the murder charge at the time of the interrogation. Although amici contend that the filing of a complaint and the issuance of an arrest warrant are sufficient to commence formal adversary proceedings in the District of Columbia, the court of appeals held to the contrary. Pet. App. 3a-4a n.1. The federal courts of appeals that have considered this issue under the Federal Rules of Criminal Procedure—which are virtually identical to the rules applicable in the District of Columbia—have reached the same conclusion. See *United States* v. *Pace*, 833 F.2d 1307, 1310-1312 (9th Cir. 1987), cert. denied, 486 U.S. 1011 (1988);

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[3] The applicability of *Miranda* rules, including *Edwards*, depends on whether the suspect is subjected to custodial interrogation, not on whether the government has initiated formal adversary proceedings as to the offense at issue. See *McNeil* v. *Wisconsin*, 111 S. Ct. at 2208.

United States v. *Duvall*, 537 F.2d 15, 20-22 (2d Cir.), cert. denied, 426 U.S. 950 (1976); cf. *United States* v. *Reynolds*, 762 F.2d 489, 493 (6th Cir. 1985) (Sixth Amendment right to counsel does not attach merely because unexecuted arrest warrant has issued).[4]

Amici's reliance on *Marrow* v. *United States*, 592 A.2d 1042 (D.C. 1991), is misplaced. In that case, the court of appeals considered D.C. Code provisions requiring that once the United States Attorney has "charged" a defendant "who is sixteen years of age or older" with assault with intent to commit murder while armed, the defendant must be prosecuted as an adult for any "subsequent delinquent act." D.C. Code §§ 16-2301(3)(A)(i); 16-2307(h) (1989). Relying on the language and purpose of the statute at issue, the court concluded that the date on which the defendant is "charged" for purposes of that statute is "the date on which the judge signed and filed the arrest 'warrant' based upon a criminal 'complaint' signed by a police officer and a supporting 'affidavit' signed by the police officer and 'approved' by an Assistant United States Attorney." 592 A.2d at 1043. The court, however, expressly noted that

> [o]ur interpretation of the phrase "charged by the United States attorney" should not be confused with interpretation of the term "charged" when used in other contexts. The Sixth Amendment right to counsel, for instance, attaches "at

[4] Although the decisions applying state law are less uniform, that is not surprising in view of the fact that a complaint serves different purposes in different States. See 1 W. LaFave & J. Israel, *Criminal Procedure* § 6.4(e), at 466-468 (1984 & 1991 Supp.).

> or after the initiation of adversary judicial proceedings—whether by way of formal *charge*, preliminary hearing, indictment, information, or arraignment." * * * However, the constitutional right to counsel at all critical stages of a prosecution reflects different policy goals from those involved in triggering the automatic transfer of jurisdiction from the Family Division to the Criminal Division, * * * and thus does not inform our decision here.

592 A.2d at 1046 n.9. The court of appeals' statement is consistent with this Court's recognition that an accused may be treated as "charged" for different purposes at different stages of the criminal process. See *United States* v. *Gouveia*, 467 U.S. 180, 190 (1984) (explaining that the Sixth Amendment right to a speedy trial, unlike the Sixth Amendment right to counsel, may attach "before an indictment and as early as the time of 'arrest and holding to answer a criminal charge,'" because the speedy trial right and the right to counsel protect different interests).

3. Finally, respondent is wrong in asserting (Resp. Br. 26) that "[t]he costs associated with [applying the *Edwards*] rule [in this case] are minor." The Court has recognized that "[a]dmissions of guilt * * * are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran* v. *Burbine*, 475 U.S. 412, 426 (1986). As interpreted by the court of appeals, the *Edwards* rule would permanently foreclose all police-initiated interrogation of persons in custody who request counsel. Because many offenders who are held in long-term custody have committed multiple crimes, such a rule would impose a particularly high cost in restricting police questioning.

This case provides a striking example of the costs that society would incur from an over-expansion of the *Edwards* rule. Respondent confessed to his role in a murder. Both courts below concluded that the confession was voluntary, knowing, and intelligent; there is no indication that the confession was the product of "badgering" or any other form of police misconduct. If respondent's confession is nevertheless suppressed, it is entirely possible that a murderer will go unpunished. Because a case such as this one evokes none of the concerns that gave rise to the decisions in *Miranda* and *Edwards*, the costs of applying *Edwards* in this context far outweigh any benefits that might be obtained from further expanding the scope of the *Edwards* rule.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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